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VIA ELECTRONIC MAIL: <http://www.regulations.gov>

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**RE: RIN 3046-AA85
Comments on the Proposed Regulations to Implement the Equal Employment
Provisions of the ADA Amendments Act of 2008**

Dear Mr. Llewellyn:

Thank you for the opportunity to submit these comments on the Equal Employment Opportunity Commission's (EEOC or Commission) notice of proposed rulemaking (NPRM or proposed rule) that would implement the Equal Employment Provisions of the Americans with Disabilities Amendments Act of 2008 (the ADA Amendments Act or the Act).¹ We respectfully submit these comments on behalf of the American Council on Education (ACE) and the College and University Professional Association for Human Resources (CUPA-HR).

STATEMENT OF INTEREST

Founded in 1918, ACE serves as higher education's unifying voice, representing all types of accredited, degree-granting colleges and universities and higher education associations. Through advocacy, research and innovative programs, ACE represents the interests of more than 1,800 institutions. Together, ACE member institutions serve eighty percent of today's college students. ACE speaks as higher education's voice in matters of public policy in Washington, DC, and throughout the nation, and provides vital programs, information and a forum for dialogue on key issues.

CUPA-HR serves as the voice of human resources in higher education, representing more than 11,000 HR professionals at over 1,700 colleges and universities across the country, including 90 percent of all U.S. doctoral institutions, 70 percent of all master's institutions, more than half of all bachelor's institutions and nearly 500 two-year and specialized institutions. Higher education employs 3.3 million workers nationwide, with colleges and universities in all 50 states.

The colleges and universities that are ACE's and CUPA-HR's member institutions are subject to the ADA Amendments Act and will be subject the EEOC's final rule implementing the Act.

¹ *Regulations under the ADA Amendments Act of 2008*, 74 *Fed. Reg.* 48431 (September 23, 2009).

COMMENTS ON THE PROPOSED REGULATION

We strongly support nondiscrimination on the basis of disability and believe that employment decisions should be based on an individual's qualifications and ability to perform a job, not on characteristics that have no bearing on job performance. During the legislative process, we worked with the drafters of the ADA Amendments Act and other interested stakeholders in an effort to ensure that in enhancing existing protections against discrimination, Congress also gave due consideration to the constraints facing institutions of higher education as employers and otherwise. We file these comments with that same objective.

We appreciate the Commission's efforts to bring greater clarity to many of the Act's provisions through the NPRM. Aspects of the proposal, however, go well beyond the balance struck in the Amendments Act and, if left unchanged, will result in serious, negative, albeit unintended consequences. We are particularly concerned that in many instances the proposed rule eliminates any meaningful distinction between an impairment and a disability and disregards the Act's requirement that disability determinations be made on a case-by-case basis.

With this in mind, we respectfully submit the comments below on the specific sections of the proposed regulations.

I. Specific Provisions of the Proposed Rule

(a) Section 1630.2(i). Inclusion of New Activities and Bodily Functions Under Major Life Activities

The ADA Amendments Act included revised language describing major life activities, including a paragraph on general activities and a separate paragraph on major bodily functions. Both paragraphs contain specific activities and functions. *See* ADA Amendments Act § 4 (a) (42 U.S.C. § 12102(2)). The proposed rule amends 29 C.F.R. Part 1630.2(i) by adding activities and functions beyond those specified in the Act. Specifically, NPRM section 1630.2(i)(1) of the proposed rule includes "reaching" and "interacting with others," and NPRM section 1630.2(i)(2) includes "special sense organs and skin," "genitourinary," "cardiovascular," "hemic, lymphatic," and "musculoskeletal," none of which were included in the ADA Amendments Act. *74 Fed. Reg.* at 48440; ADA Amendments Act § 4 (a) (42 U.S.C. § 12102(2)).

The Act's legislative history shows that Congress gave careful consideration to which activities and bodily functions it should include in the illustrative list of major life activities and purposefully limited that list to what is currently contained in the Act. *See* Statement of Managers to accompany S. 3406 at S8842. Neither "reaching" nor "interacting with others" is found in the ADA's current regulations or the ADA Amendments Act. *See* 29 C.F.R. Part 1630.2(h)(1); ADA Amendments Act § 4 (a) (42 U.S.C. § 12102(2)).

Although the enumerated lists of major life activities and major bodily functions are illustrative and not exhaustive, given the legislature's careful consideration of the definition of major life activities and its obvious awareness that most of the terms in question were included in the current regulations, we think it is significant that such terms were not included in the Act. We

therefore respectfully suggest that section 1630.2(i) of the proposed rule should be revised to specify only those activities and conditions actually set forth in the ADA Amendments Act.

(b) Limiting Consideration of Hard Evidence Unnecessarily Complicates Disability Determinations

The NPRM states, “[t]he comparison of an individual’s limitation to the ability of most people in the general population often may be made using a common sense standard, without resorting to scientific or medical evidence.” NPRM section 1630.2(j)(2)(iv) (74 Fed. Reg. at 48440). In doing so, the NPRM suggests that courts should not consider hard evidence that may be directly relevant to whether a condition is indeed limiting, let alone substantially limiting. Moreover, there is no support for the EEOC’s position found in the ADAAA or its legislative history.

We respectfully suggest that the Agency delete NPRM section 1630.2(j)(2)(iv). This would be both consistent with the Act and legislative history and allow employers to assess all impairments using a meaningful, objective, analytical process.

(c) Designation of “Per Se” Disabilities Destroys the Distinction Between Impaired and Disabled

The proposed rule effectively, if not literally, designates several specific impairments as “*per se*” disabilities. See NPRM sections 1630.2(j)(2)(iv) and (j)(5)(i) (74 Fed. Reg. at 48440-48441). The designation of *per se* or even presumptive disabilities is completely unsupported by the ADA Amendments Act. No matter what the impairment, the Act still plainly requires a separate analysis and decision as to whether it substantially limits one or more major life activities. See ADA Amendments Act § 4 (a) (42 U.S.C. § 12102(2)). The legislative history is clear on this point as well. See Statement of Managers to accompany S. 3406 at S8841 (“An impairment that does not substantially limit a major life activity is not a disability under this prong. That will not change after the enactment of the ADA Amendments Act, *nor will the necessity of making this determination on an individual basis.*” (emphasis added)).

Moreover, the Agency’s position on this issue is likely to cause confusion with respect to the enumerated impairments, as evidenced from the proposed rule’s inconsistent discussion of diabetes. The NPRM actually addresses diabetes in three different provisions using three different analyses (one as a presumptive disability and two as a *per se* disability). In one of the examples treating diabetes as a *per se* disability (“[d]iabetes, which substantially limits major life activities...”) the proposed rule cites for support the 2008 Report of the House Judiciary Committee. NPRM section 1630.2(j)(5)(D) (74 Fed. Reg. at 48441) citing H. Rep. No. 110-730, Part 2, at 17. The only relevant sentence contained in the cited page of the Judiciary Committee Report is the following: “An impairment can materially restrict the operation of a major bodily function *if* it causes the operation to over-produce or under-produce in some harmful fashion.” *Id.* (emphasis added). The EEOC has disregarded the crucial word “if” in the Judiciary Committee Report, which actually confirms that Congress did not intend to create a category of *per se* disabilities.

Whether or not any of the conditions at issue here will consistently rise to the level of a disability because they do in fact substantially limit one or more major life activities, the NPRM dictates that this will always be the case. The proposed rule thus disregards the statutory distinction

between impairment and disability and the requirement that the determination of a disability be made on a case-by-case basis. The NPRM should be revised in order to be consistent with the ADA Amendments Act and eliminate references that imply the existence of *per se* or presumptive disabilities.

The current Appendix to 29 C.F.R. Part 1630 provides that “[t]he ADA and this part, like the Rehabilitation Act of 1973, do not attempt a ‘laundry list’ of impairments that are ‘disabilities.’ The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.” Appendix to 29 C.F.R. Part 1630.2(j). Especially in light of the fact that the ADA Amendments Act was intended by its terms to bring administration of the ADA closer to the way that the Rehabilitation Act of 1973 has been administered, including laundry lists of impairments is not only uncalled for, but contrary to Congressional intent. *See* ADA Amendments Act § 2 (a)(3) (42 U.S.C. § 12101 Historical and Statutory Notes).²

We respectfully suggest that the Agency delete both the list of disabilities that “will consistently meet” (as well as any other references or examples in the NPRM that presume an impairment is automatically a disability)³ and the “may be disabling for some individuals but not for others,” from the proposed rule and allow employers to assess all impairments using an objective, analytical process without being biased by the regulatory language.

(d) The Proposed Rule’s Treatment of “Transitory and Minor” Impairments Is Improper and Will Lead to Confusion Over Short-Term Impairments

Under Rules of Construction, the proposed rule states that the “‘transitory and minor’ exception in 1630.2(l) of this part (the ‘regarded as’ prong of the definition of ‘disability’) does not establish a durational minimum for the definition of ‘disability’ under § 1630.2(g)(1) (actual disability) or § 1630.2(g)(2) (record of a disability). An impairment may substantially limit a major life function even if it lasts, or is expected to last, for fewer than six months.” NPRM section 1630.2(j)(2)(v) (74 *Fed. Reg.* at 48440). Yet, in other provisions of the proposed rule, EEOC makes clear that the first prong of the definition of disability does not include conditions of “short-term duration” or impairments not “expected to last for several months or more.” NPRM sections 1630.2(j)(2)(ii)(A) and (j)(6)(D) (74 *Fed. Reg.* at 48440-48442).

The NPRM statement that impairments of less than six months may constitute disabilities under prongs one and two conflicts with the text of the Act and only serves to invite confusion and litigation. This problem is exacerbated by the ambiguity inherent in the NPRM’s vague

² In addition, we understand that during the deliberations over the ADAAA, Congress considered creating a *per se* list, but decided against doing so, finding a list unworkable. This, in itself, should preclude the EEOC from considering creating a *per se* or even presumptive list.

³ For example, in NPRM section 1630.2(j)(2)(iii)(A), the proposed rule states with respect to diabetes that “[a]n individual whose endocrine system is substantially limited due to diabetes need not also show that he is substantially limited in eating or any other major life activity.” Similarly, in NPRM section 1630.2(j)(2)(iii)(B), the proposed rule states that “[a]n individual whose normal cell growth is substantially limited due to cancer need not also show that he is substantially limited in working or any other major life activity.” While we agree that an individual with diabetes need not show a substantial limitation of a second major life activity *if* his or her endocrine system is substantially limited, the Agency’s examples of diabetes and cancer seem to presume that a substantial impairment automatically results from the conditions. This presumption is neither required nor justified under the Act.

language of “not of short-term duration” and “that is expected to last for several months or more.” This language fails to provide any clear guidance as to where the threshold lies and will almost certainly lead not only to a rash of claims based on temporary impairments lasting anywhere from several weeks to six months, but also conflicting judicial opinions and inevitable appeals.

The ADA Amendments Act provides that no impairment “with an actual or expected duration of 6 months or less” can be a basis for a finding of being “regarded as” disabled. ADA Amendments Act § 4 (a) (42 U.S.C. § 12102(2)). This clearly sets a statutory durational minimum for a condition to be considered an impairment under the third, or “regarded as,” prong of the definition of disability. While the Act does not specifically provide for temporal limitation for the first two prongs of the definition of disabled, it is still clear from the statutory language and legislative history that transitory and minor conditions are not to be considered disabilities. Quite simply, if a condition cannot meet the lower threshold of impairment under the third prong, it cannot meet the higher threshold of a disability under the first prong.

The legislative history is instructive both as to the reasoning and as to the content of the proposed rule on this point. Both the Senate and the House of Representatives explained that the six-month requirement was added with respect to the “regarded as” prong to avoid abuse in the form of claims based on the common cold or ordinary flu, which was found necessary because the “regarded as” prong does not contain a functional limitation requirement. *See* Statement of Managers at S8842; Report of the House Committee on the Judiciary at 18, H. Rep. No. 110-730, Part 2, at 18. 2008; Report of the House Committee on Education and Labor at 14, H. Rep. No. 110-730, Part 1, at 14. In other words, Congress did not specifically include the durational limitation language for prongs one and two of the definition of disability, because it felt the “substantially limits” requirement would preclude consideration of such short-term conditions.

The proposed rule acknowledges this principle in several places, though with no clear guidelines as to duration. Examples include the following:

1. Under Rules of Construction, “Someone with a 20-pound lifting restriction *that is not of short-term duration* is substantially limited in lifting, and need not also show that he is unable to perform activities of daily living ...” NPRM section 1630.2(j)(2)(ii)(A) (74 *Fed. Reg.* at 48440) (emphasis added).
2. Under Examples of Impairments That May Be Disabling for Some Individuals But Not For Others: “An individual with a back or leg impairment who is substantially limited compared to most people in the length of time she can stand ... is an individual with a disability (such as where the individual has a back impairment resulting in a 20-pound lifting restriction *that is expected to last for several months or more*). NPRM section 1630.2(j)(6)(D) (74 *Fed. Reg.* at 48442) (emphasis added).
3. Under Types of Work: “A *permanent* knee impairment that does not substantially limit an individual’s ability to walk as compared to most people in the general population nevertheless substantially limits the individual in working if it substantially limits her in performing the job for which she is applying and other jobs that require walking long distances.” NPRM section 1630.2(j)(7)(iii)(C)(4) (74 *Fed. Reg.* at 48443) (emphasis added).

This section of the proposed rule not only invites confusion, but also opens the door to unnecessary litigation, including absurd legal debates over whether an individual that does not have an impairment under the regarded as prong could in theory meet the higher threshold of the Act's definition of disability. We respectfully submit that a revision to the proposed rule is needed to avoid confusion and unnecessary litigation, while remaining consistent with the Act. Specifically, the Agency should delete the current language in NPRM section 1630.2(j)(2)(v) and replace it with language clarifying that if a condition cannot meet the lower threshold of impairment under the third prong, it cannot meet the higher threshold of a disability under the first prong.

(e) *The Type of Work Provisions Are Unnecessary and Are Contrary to Congressional Intent*

The proposed rule includes new language under the heading "Type of Work" that would significantly broaden the application of the major life activity of working. Under the existing regulations, "the major life activity of *working*" is considered with respect to "either a class of jobs or a broad range of jobs in various classes." 29 C.F.R. § 1630.2(j)(3). Further, the current regulations plainly state that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).

The proposed rule changes the scope to "the job the individual has been performing, or for which the individual is applying, and jobs with similar qualifications or job-related requirements which the individual would be substantially limited in performing because of the impairment." NPRM section 1630.2(j)(7)(iii) (74 *Fed. Reg.* at 48442-48443).

Nothing in the ADA Amendments Act called for changing the focus from "a class or a broad range of jobs" to the level of a specific job. This change is unnecessary, and as the legislative history reflects, contrary to the intent of the Act. The 2008 House Judiciary Committee Report addresses this issue directly and unequivocally: "The committee is not intending to convey that Equal Employment Opportunity Commission regulations regarding class of jobs/range of jobs under prongs one and two need to be revisited as a result of the clarification of prong three." Report of the House Committee on the Judiciary at 18, H. Rep. No. 110-730, Part 2, at 18.

Lastly, the "class of jobs" analysis in the existing regulation is based on long-standing interpretations of the major life activity of working that were developed in seminal court decisions under the Rehabilitation Act. *See* Appendix to 29 C.F.R. Part § 1630.2(j) and EEOC Compliance Manual: Section 902.4(c)(2) Definition of the Term Disability.⁴ The ADA Amendments Act was intended by its terms to bring administration of the ADA closer to the way that the Rehabilitation Act of 1973 has been administered. *See* ADA Amendments Act § 2 (a)(3) (42 U.S.C. § 12101 Historical and Statutory Notes). The proposed changes to the scope of the major life activity of working deviate substantially from the holdings of the Rehabilitation Act cases and are therefore contrary to the plain language of the Act as well as the Congressional intent.

⁴ These sources cite the following Rehabilitation Act cases: *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *State v. Hennepin County*, 441 N.W.2d 106 (Minn. 1989); *Wright v. Tisch*, 45 Fair Empl. Prac. Cas. (BNA) (E.D. Va. 1987); and *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980).

In short, by changing the scope of the major life activity of working, the EEOC is not only contradicting clear Congressional intent, but also throwing out 35 years of case law interpreting this complex concept that Congress instructed it to preserve. In doing so, the EEOC ignores its statutory mandate and invites confusion and unnecessary litigation.

We therefore respectfully suggest that the proposed rule be revised to preserve the current job class and range of jobs language.⁵

(f) The Provisions on Actions Taken Based on Symptoms Are Impermissibly Broad

The EEOC has specifically invited comments on the provisions of the proposed rule addressing actions based on symptoms as opposed to actual impairments. The proposed rule, under the “regarded as” prong, provides that “[a] prohibited action includes, but is not limited to, an action based on a symptom of such an impairment, or based on medication or any other mitigating measure used for such an impairment.” NPRM section 1630.2(1)(2) (74 *Fed. Reg.* at 48443). The proposed rule offers two examples:

(i) Example 1: An individual who is not hired for a driving job because he takes anti-seizure medication is regarded as having a disability, even if the employer is unaware of the reason the employee is taking the medication.

(ii) Example 2: An employer that refuses to hire someone with a facial tic regards the individual as having a disability, even if the employer does not know that the facial tic is caused by Tourette Syndrome.

Id.

The statute clearly prohibits discrimination based on being regarded as having “an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” ADA Amendments Act § 4 (a) (42 U.S.C. § 12102(2)). It does not prohibit actions based only on symptoms (let alone a single symptom, as the proposed rule contemplates). The proposed rule plainly exceeds the statutory mandate by creating a cause of action for something less than an impairment. The issue of whether an employer perceives an individual as having an impairment because of a symptom and therefore violates the Act is an evidentiary question. The EEOC cannot short circuit the evidentiary process by simply claiming in the regulation that evidence of a possible violation of the Act in itself constitutes a violation of the Act.

It takes little imagination to envision situations where an employment action could be taken based on some action or characteristic that might be a symptom of an impairment, but also might be encountered frequently in the absence of any impairment.

⁵ We urge the EEOC also consider eliminating the phrase “as compared to most people having comparable training, skills and abilities,” from the regulations. It is inconsistent with the requirement that an individual be substantially limited in “ability to perform a major life activity *as compared to most people in the general population.*” (74 *Fed. Reg.* at 48440-2); *see also*, 2008 Report of the House Committee on Education and Labor, H. Rep. No. 110-730, Part 1, at 9; and the Statement of Managers to accompany S. 3406 at S8842. For the same reasons, we urge the Agency also to strike any other references in the NPRM that suggest the appropriate comparator would be anything other than “*most people in the general population,*” including the reference to “intra-individual differences” in the NPRM’s appendix. (74 *Fed. Reg.* at 48446).

One example would be falling asleep on the job, which could be caused by any number of physical or mental impairments, but could also be caused simply by a poor night of sleep. An employee found sleeping on the job is likely to be disciplined, and the proposed rule would potentially give rise to an action for regarded as discrimination without any indication that the employer had the slightest thought about anything other than the fact that the employee was sleeping on the job.

Similarly, an employee might act offensively or aggressively toward a co-worker and be subject to discipline under the employer's anti-harassment policy. Offensive or aggressive behavior could be a symptom of some mental impairments, but could also have nothing to do with any impairment.

The ADA Amendments Act requires that action under the regarded as prong must be based on an actual or perceived impairment. Prohibiting actions based only on a symptom or symptoms falls far short of implicating any actual impairment and would far exceed the intent and plain language of the Act. We therefore respectfully suggest that the symptom-only language be deleted from the proposed rule.

II. Summary and Discussion of Case Law

As Discussed Above With Respect to Numerous Provisions, the Proposed Rule Goes Well Beyond the Explicit Requirements of the ADA Amendments Act, and Well Beyond the Congressional Intent

The ADA Amendments Act makes clear that it had three main purposes: 1) to legislatively overrule the Supreme Court's decisions in *Sutton* and *Toyota*⁶ and related cases and to reinstate the reasoning of *Arline*⁷; 2) to clarify that the definition of disability is to be construed broadly and not subjected to a high standard; and 3) to bring administration of the ADA closer to the historical administration of the Rehabilitation Act of 1973. See ADA Amendments Act § 2 (a) (42 U.S.C. § 12101 note). Despite the magnitude of the resulting change to Supreme Court case law, the Act is quite succinct and its requirements are specific.

The Supreme Court's holdings in both *Sutton* and *Toyota* are remarkably narrow. The *Sutton* Court held that the question of disability was to be determined after taking mitigating measures into account, and that the plaintiffs in that case could not prevail on a "regarded as" theory because they were not "substantially limited" after considering the mitigating measures. *Sutton*, 527 U.S. at 482, 491. In *Toyota*, the Court held that the requirements of the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that one must have "an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Toyota*, 534 U.S. at 197-198. The ADA Amendments Act was nearly surgical in the economy with which it overruled the narrow holdings of *Sutton* and *Toyota*, and embraced the holding of *Arline*.

Significantly, *Arline* does not dispense with careful, step-by-step analysis in disability determinations, which gives further weight to the idea that in the ADA Amendments Act,

⁶ *Sutton v. United Air Lines, Inc.* 527 U.S. 471 (1999); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

⁷ *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

Congress intended nothing like the creation of *per se* disabilities or lists of impairments to be analyzed more or less than other impairments. *See id. Arline*, 480 U.S. at 276-286.

CONCLUSION

While the Act did direct the EEOC to make certain limited, specifically identified changes to the regulations, and to carry out the changes necessary as a result of the overruling of *Sutton* and *Toyota*, it did not call for the addition of major life activities beyond those specified in the Act; it did not direct the enumeration of “presumptive” or “*per se*” disabilities or of specific impairments that are either more or less likely to constitute disabilities; it did not dictate that transitory and minor impairments could include any lasting only “several months;” it did not mandate *any* revisions to existing regulatory language on the class or range of jobs; and it did not prohibit action solely based on symptoms rather than impairments.

We appreciate the opportunity to submit these comments. If we can be of further assistance on this matter, please do not hesitate to contact us.

Respectfully submitted,



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